No. 78-1609

In the Supreme Court of the United States

OCTOBER TERM, 1978

BENJAMIN L. GOINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 593 F.2d 88.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1979, and a petition for rehearing was denied on March 21, 1979. The petition for a writ of certiorari was filed on April 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the admission into evidence of out-of-court statements made by a declarant who was deceased at the time of trial violated the Federal Rules of Evidence or petitioner's constitutional right of confrontation.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(a) (Count One), testifying falsely before a grand jury, in violation of 18 U.S.C. 1623 (Count Two), soliciting false testimony before a grand jury, in violation of 18 U.S.C. 1503 (Count Three), and three counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1) (Counts Four to Six). He was sentenced to consecutive prison terms of five years on Count One, one year on Count Two, and one year on Count Three, to be followed by five years' probation. On the other counts he was sentenced to concurrent terms of one year's imprisonment, which was suspended in favor of five years' probation. He was also fined $3,000 on Count One and $1,000 on each of the other five counts. The court of appeals affirmed (Pet. App. A-1 to A-11).

1. The evidence, the sufficiency of which is not disputed, is summarized in the opinion below (Pet. App. A-2 to A-3). It showed that petitioner was the License Collector for the City of St. Louis from 1968 until 1977. His duties included collecting cigarette stamp tax and license fees for cigarette vending machines (Tr. 201, 1274, 1280).[1] Petitioner accepted bribes from Raymond Scharf in return for permitting Scharf to sell unstamped cigarettes in unlicensed vending machines throughout St. Louis (Tr. 275-276, 279, 282-284, 405, 412-413, 437, 439, 453-454, 507). Petitioner used part of the funds received from Scharf to finance the concealed purchase of a cocktail lounge operated by Joyce Harlston (Tr. 960-962, 291-293; Gov. Exh. 8A). For the years 1973 to 1975 petitioner failed to pay income tax on any of the bribery income or on the income received from the cocktail lounge.

Thereafter, petitioner testified falsely before a federal grand jury that was investigating these matters. Petitioner also encouraged Harlston to give false and misleading testimony before the grand jury, advising her in the presence of her daughter to conceal his interest in the cocktail lounge and to claim that the money used to open the cocktail lounge had been left to her by a deceased relative (Tr. 969-970).

2. Veronica Harlston Raiford (Harlston's daughter), Samuel Davis (an employee at Harlston's cocktail lounge) and Gregory Hawkins (a police officer and Harlston's friend) were among the more than 50 government witnesses at petitioner's trial.

Raiford testified about the advice that she heard petitioner give her mother prior to the grand jury appearance. Raiford also said that her mother had told her that she had testified falsely before the grand

[1] "Tr." refers to the trial transcript; "H. Tr." refers to the hearing on petitioner's motion to suppress.

jury about the source of the financing for the lounge and had concealed petitioner's interest in the lounge (Tr. 970). Davis testified that in the summer of 1975, after the Internal Revenue Service had begun to audit the books of the cocktail lounge, Harlston told petitioner in Davis's presence that she needed a receipt of some sort for the $16,000-$17,000 that she had paid petitioner. Davis also stated that Harlston had mentioned the same subject to him before the meeting with petitioner (Tr. 905, 908-909). Hawkins testified that in the summer of 1976, after the IRS had subpoenaed records pertaining to the operation of the lounge, Harlston admitted to him that she had lied before the grand jury at petitioner's behest (Tr. 1046-1047).[2]

The government also introduced taped conversations recorded with the consent of Harlston, who began to cooperate in the government's investigation in September 1976. In these recorded conversations petitioner admitted his receipt of money from Scharf, his investment in the cocktail lounge and efforts to conceal his interest, and his own perjury before the grand jury (H. Tr. 21-30; Tr. 1058-1070; Gov. Exhs. 41-45). Harlston was to have been a government witness at petitioner's trial, but she died less than three weeks before the trial began.

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[2] Petitioner did not object to this testimony during Hawkins' direct examination (Tr. 1042-1047).

ARGUMENT

Petitioner's sole contention is that the introduction of the out-of-court statements made by Harlston to her daughter, to Davis, and to Hawkins violated both the Federal Rules of Evidence and his Sixth Amendment right of confrontation.

We note at the outset that, even if these statements were improperly admitted at trial, the error was harmless beyond a reasonable doubt. As noted above, Davis testified that, after Harlston had told him about the tax problem occasioned by the payments to petitioner, he met with both Harlston and petitioner to discuss the matter. The incriminating statements made by petitioner at this meeting were plainly admissible (see Fed. R. Evid. 801(d)(2)(A)), and the prior conversation between Harlston and Davis on the same subject was thus merely cumulative. Similarly, Harlston's statements to her daughter and Hawkins that she had lied before the grand jury did not add substantially to petitioner's admissions in the tape recorded conversations or to the daughter's other testimony that she had overheard petitioner advise her mother to conceal his interest in the lounge.

In any event, Harlston's statements were properly admitted in the circumstances of this case.

1a. Harlston's statement to Davis regarding the payments to petitioner that had been concealed from the IRS was made during the course and in furtherance of a conspiracy to defraud the United States of income taxes. It was thus admissible under Fed. R. Evid. 801(d)(2)(E). *Anderson* v. *United States*,

417 U.S. 211, 218 (1974). Harlston made it clear to Davis that she did not want to reveal petitioner as the recipient of the funds (Tr. 905-909). Davis testified that he suggested having someone else simply declare the income and pay the taxes, but this solution was rejected (Tr. 910-911). Instead, petitioner, Harlston and Davis decided to obtain a receipt from Scharf showing that the money given to petitioner had been turned over to Scharf as repayment of a loan (Tr. 911). This evidence plainly supports the court of appeals' conclusion (Pet. App. A-6) that Harlston's statement to Davis was part of a conspiracy directed at obtaining his help in continuing the concealment from the IRS of petitioner's financial involvement in the cocktail lounge. See *United States* v. *Scholle*, 553 F.2d 1109, 1117-1118 (8th Cir.), cert. denied, 434 U.S. 940 (1977); *United States* v. *Smith*, 550 F.2d 277, 281-282 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Zamarripa*, 544 F.2d 978, 981-982 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Richardson*, 477 F.2d 1280, 1282-1283 (8th Cir.), cert. denied, 414 U.S. 843 (1973); *United States* v. *Williams*, 435 F.2d 642, 645 (9th Cir. 1970), cert. denied, 401 U.S. 995 (1971).[3]

[3] Narratives of past events offered as an integral part of the planning of future strategy in furtherance of a conspiracy fall within the co-conspirator exception to the hearsay rule. "A statement of one conspirator to another during the active course of a conspiracy, giving the full setting of an upset, with the purpose of getting reassurance or other help, does not cease to be in furtherance of the conspiracy because it contains a natural and pertinent reference to a past fact." *United States* v. *Pardo-Bolland*, 348 F.2d 316, 324-325 (2d Cir.), cert. denied, 382 U.S. 944 (1965). See *United States* v. *Haldeman*, 559 F.2d 31, 110-111 (D.C. Cir. 1976) (en banc), cert. denied, 431 U.S. 933 (1977); *United States* v. *James*, 510 F.2d 546, 549-550 (5th Cir.), cert. denied, 423 U.S. 855 (1975); *United States* v. *Manarite*, 448 F.2d 583, 590-591 (2d Cir.), cert. denied, 404 U.S. 947 (1971).

b. Harlston's remarks to her daughter and to Hawkins concerning her grand jury perjury were properly admitted as declarations against penal interest. Fed. R. Evid. 804(b)(3). Although petitioner emphasizes Harlston's eventual cooperation with the government and the favorable resolution of her potential criminal liability, he cites no evidence that she was even attempting to bargain with the government at the time she made the declarations in question. Harlston's statement to her daughter was made immediately after her grand jury appearance, and the similar admission to Hawkins occurred when she was seeking his advice about how to respond to an IRS subpoena. It was not until after Hawkins advised her to go to the authorities and tell the truth that Harlston approached the government and agreed to cooperate.

Harlston's obvious exposure to criminal charges at the time she made the statements, and her choice of a close friend and a relative as confidants, both indicate the trustworthiness of the declarations. As the court of appeals concluded (Pet. App. A-4 to A-5), the test of admissibility of such statements—whether the statement is so contrary to the declarant's interest

in avoiding criminal liability that a reasonable person in declarant's position would not have made the statement unless he believed it to be true—was satisfied here. See *United States* v. *Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978); *United States* v. *Oropeza*, 564 F.2d 316, 324-325 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); *United States* v. *Bagley*, 537 F.2d 162, 165-167 (5th Cir. 1976), cert. denied, 429 U.S. 1075 (1977).[4]

Petitioner argues that the use of statements against penal interest inculpating the accused has been criticized by commentators, notably Judge Weinstein, as being inherently untrustworthy. 4 *Weinstein's Evidence* ¶ 804(b)(3)[03], at 804-93 to 804-95 (1978). Nevertheless, Rule 804(b)(3) unquestionably allows the use of such statements. See *United States* v. *Barrett*, 539 F.2d 244, 250 (1st Cir. 1976). The Advisory Committee Notes explain that declarations that implicate the accused may be included in the category of statements against interest, so long as they qualify as actually against the declarant's interest:

[4] A second requirement, that corroborating circumstances clearly indicate the trustworthiness of the statement, applies only to declarations exculpating the accused. Fed. R. Evid. 804(b)(3). See *United States* v. *White*, 553 F.2d 310, 313 & n.8 (2d Cir.), cert. denied, 431 U.S. 972 (1977). But see *United States* v. *Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978). In any event, as we have noted, Harlston's statements were amply corroborated. Raiford was present when petitioner told Harlston what to say to the grand jury (Tr. 969-970), and the jury also heard tape recordings of petitioner's admissions of his efforts to frustrate the government's investigations (H. Tr. 21-30; Tr. 1058-1070; Gov. Exhs. 41-45).

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying.

56 F.R.D. 183, 328 (1973). In the present case, as discussed above, the circumstances surrounding Harlston's statements make it quite unlikely that her remarks were actually self-serving and therefore untrustworthy.

Each of the decisions cited by petitioner merely illustrates that the admissibility of a declaration under Rule 804(b)(3) depends upon a case-by-case analysis of a number of factors.[5] In *United States* v. *Bailey*, 581 F.2d 341, 345 (3d Cir. 1978), the court refused to admit a statement implicating both the defendant and the declarant because the confession had been given while the declarant was in police custody and after he had been offered a plea bargain. Similarly, the statements held inadmissible in *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977), had been made after the declarant had been convicted,

[5] Petitioner characterizes these cases as supporting his constitutional claim (Pet. 12). In fact, however, the decisions in all three cases cited (Pet. 12-13) rested on evidentiary grounds alone.

given immunity, and pressured to testify by both the prosecutor and the grand jury. The court concluded that in these circumstances the giving of the testimony was in the best interest of the witness, rather than against it. See also *United States* v. *Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978). Here, by contrast, Harlston's statements were made to her daughter and a friend, not to government officials. She was not in police custody at the time, nor is there any indication in the record that she was attempting to strike a bargain with the government when she made her admissions. Harlston was still very much subject to criminal liability; her later decision to cooperate cannot serve to change her earlier state of mind.

Finally, contrary to petitioner's contentions (Pet. 13), *United States* v. *Brandenfels*, 522 F.2d 1259 (9th Cir.), cert. denied, 423 U.S. 1033 (1975), does not conflict with the instant case. Although in *Brandenfels* the Ninth Circuit reiterated its refusal to recognize the rule allowing admission of declarations against penal interest (522 F.2d at 1263), the court subsequently abandoned that position in light of the Federal Rules of Evidence and now leaves the determination of admissibility under Rule 804(b)(3) to the discretion of the trial court, subject to application of the proper test. *United States* v. *Hoyos*, *supra*, 573 F.2d at 1115; *United States* v. *Satterfield*, 572 F.2d 687, 690 (9th Cir.), cert. denied, No. 77-6600 (Oct. 2, 1978); *United States* v. *Oropeza*, *supra*, 564 F.2d at 325.[6]

In sum, petitioner does not dispute that the Federal Rules of Evidence allow the introduction of hearsay statements made in furtherance of a conspiracy or against penal interest. Although he asserts that Harlston's statements did not satisfy these exceptions for a number of reasons, the district court and the court of appeals rejected his claims. These essentially fact-bound determinations do not warrant further review.

2. Petitioner argues that the admission of Harlston's hearsay statements, even if consistent with the Federal Rules of Evidence, violated his Sixth Amendment right of confrontation.[7] Specifically, he claims

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[6] Moreover, *Brandenfels* was a case in which the statement—exculpating the accused—was not against the declarant's interest and was otherwise unreliable. 522 F.2d at 1264.

[7] The Confrontation Clause has never been construed to create an absolute bar to the admission of hearsay testimony by an unavailable declarant. See *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973). As the Court noted in *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970), "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials * * *." Hence, hearsay testimony is frequently introduced in the form of, *e.g.*, co-conspirator declarations, former testimony, dying declarations, and statements against interest, and although the defendant may be deprived of the opportunity literally to "confront" his accuser at trial, the constitutionality of admitting such evidence pursuant to recognized exceptions to the hearsay rule has repeatedly been upheld. See, *e.g.*, *Mattox* v. *United States*, 156 U.S. 237, 243 (1895); *Kirby* v. *United States*, 174 U.S. 47, 61 (1899); *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965); *California* v. *Green*, 399 U.S. 149,

(Pet. 9-12) that the court of appeals erroneously relied on its previous decision in *United States* v. *Scholle*, *supra*, in its determination of the constitutional issue but that *Scholle* involved statements of a co-conspirator, not statements against penal interest inculpating the accused.

Petitioner's assertions are not supported by the record. The court of appeals relied on *Scholle* for its statement of the appropriate test to apply in assessing the constitutionality under the Confrontation Clause of any exception to the hearsay rule involving the out-of-court statement of an unavailable declarant (Pet. App. A-6 to A-7). That test, drawn from *Dutton* v. *Evans*, 400 U.S. 74 (1970), consists of an analysis of the circumstances surrounding the giving of the statement, with a focus on various factors that could affect the integrity of the fact-finding process, *e.g.*, whether the statement bears sufficient indicia of reliability, whether the evidence was crucial to the government's case, whether the jury had an adequate opportunity to weigh the credibility of the statement, and whether the trial court gave appropriate instructions. Pet. App. A-7, quoting *United States* v. *Scholle*, *supra*, 553 F.2d at 1119-1120. See also *United States* v. *Oates*, 560 F.2d 45, 81-83 (2d Cir. 1977); *United States* v. *Rogers*, 549 F.2d 490, 500-502 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); *United States* v. *Baxter*, 492 F.2d 150, 177 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974).

165-168 (1970). See generally *McCormick on Evidence* § 252, at 606-607 (2d ed. 1972).

Applying this test, the court of appeals correctly found that the statements admitted here did not violate petitioner's Sixth Amendment right (Pet. App. A-7 to A-8). Harlston made all of the statements spontaneously to a close friend and a relative in whom she would be expected to confide and to whom she had no apparent reason to lie. See *Green* v. *Georgia*, No. 78-5944 (May 29, 1979). The statements could not have been based on faulty recollection or perception. Moreover, as the court below noted (Pet. App. A-8), the statements were amply corroborated by other evidence at trial and were not crucial to the case against petitioner. Scharf's testimony established the payment of the bribes, as well as petitioner's investment of those funds in the cocktail lounge, and this testimony was strongly confirmed by a number of witnesses and documents. Petitioner's own tape-recorded admissions also proved his concealed interest in the tavern, his false statements to the grand jury, and his encouragement of Harlston's perjury. In sum "[o]verwhelming evidence" (Pet. App. A-2) was offered at trial that petitioner accepted bribes from Scharf and used the money to purchase the lounge operated by Harlston. The jury thus had a substantial basis for assessing the credibility of Harlston's statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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